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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

CHRISTOPHER CANTWELL

\* 1:20-cr-6-01-PB  
\* February 25, 2021  
\* 3:18 p.m.

\* \* \* \* \*

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government:

Anna Z. Krasinski, AUSA  
United States Attorney's Office

For the Defendant:

Eric Wolpin, Esq.  
Jeffrey S. Levin, Esq.  
Federal Defender's Office

Probation Officer:

Sean Buckley

Court Reporter:

Liza W. Dubois, RMR, CRR  
Official Court Reporter

## PROCEDINGS

2 THE COURT: Good afternoon. This is Judge  
3 Barbadoro. I apologize I'm a little late. I just had to  
4 finish up another hearing.

5 So, Vinny, are you on the line?

6 THE CLERK: I am, Judge. Everyone who needs to be  
7 here is on the line.

8 THE COURT: Okay. Super.

9 So I just wanted to talk to the parties about this  
10 condition. I'd like to find a way to work this out in a way  
11 that's satisfactory to Mr. Cantwell that also achieves the  
12 purposes that we're trying to achieve with the condition. And  
13 I don't -- I don't know which -- whoever from the defense wants  
14 to speak, if you could just tell me what your concern is about  
15 the condition and if you have any thoughts about ways we could  
16 try to achieve the purposes of the condition it's designed to  
17 achieve without unduly interfering with Mr. Cantwell's ability  
18 to access and use the Internet.

19 MR. LEVIN: Thank you, your Honor. Jeff Levin on  
20 the line.

21 Your Honor, we -- we maintain our objection to the  
22 proposed special conditions 10 and 11. Generally speaking, we  
23 think they're unnecessary to address the -- the purposes of  
24 supervision and rehabilitation.

25 The issue for us is that he has -- he's going to be

1 working as an IT person and so he will be using computers and  
2 the Internet for his job. This is -- this is really the -- the  
3 way he has traditionally earned money is working as an IT  
4 person and there's a company that's willing to hire him.

5 The concern is that the software that's used by  
6 probation collects data from monitored computers. So if it's  
7 on a smartphone, it tracks usage of a person's communications  
8 and the same is true if it's on a -- on a company computer.

9 So the -- that's the real concern, that it's going  
10 to impact customers, impact data that's proprietary to the  
11 company he's working for, and we think, you know, it's really  
12 unnecessary in this case. This was a private -- based on a  
13 private communication between him and the victim in this case.  
14 This isn't a situation where he's viewing child pornography or,  
15 you know, searching for contraband information. This is really  
16 a situation where it would be monitoring his First  
17 Amendment-protected activities and his employment activities.

18 THE COURT: All right. So can I ask first, do I  
19 have a court reporter recording this?

20 THE COURT REPORTER: Yes.

21 THE COURT: Oh, great. Okay. Thank you.

22 Someone wanted to speak?

23 THE PROBATION OFFICER: Yes, your Honor. Sean  
24 Buckley with probation.

25 THE COURT: Yes.

1 THE PROBATION OFFICER: I've been informed today by  
2 Christopher Pingree in our supervision unit that this  
3 monitoring would not be installed on a company's computer. So  
4 if he's working for a third party, they would not install that  
5 monitoring software on that equipment.

6 THE COURT: Yeah, you anticipated my proposal,  
7 Mr. Buckley. I -- I think we -- one way we could address part  
8 of the objection -- so I don't expect the defendant to  
9 relinquish any objection he has to anything, but one of the  
10 things I was thinking about is, A, to say he shall disclose to  
11 the probation officer all electronic devices that he will be  
12 using for personal communication, nonwork-related  
13 communication; he shall agree not to use any electronic devices  
14 provided by an employer for any personal purposes; and any  
15 monitoring software will be installed only on devices that he  
16 discloses he may be using for personal purposes.

17                   That would protect the employer -- potential  
18 employer from any monitoring of that employer's work-related  
19 activities. The defendant would be prohibited from using his  
20 employer-provided electronic equipment for personal purposes  
21 and we would be able to monitor, to the extent we felt it  
22 necessary, his personal use.

23 THE PROBATION OFFICER: Correct.

24 THE COURT: Again, I don't expect the defendant to  
25 do anything, but Mr. Buckley, that would be satisfactory to

1 probation?

2 THE PROBATION OFFICER: Absolutely, your Honor.

3 THE COURT: Okay. So, Mr. Levin, one of your  
4 concerns, I believe, we can take care of. You still have First  
5 Amendment and -- this is overreach and unnecessary on First  
6 Amendment grounds, restricts his ability to carry out his life  
7 functions, the Internet's essential and so on. Do you want to  
8 press those arguments here?

9 MR. LEVIN: Yes, your Honor, but we would also ask  
10 that if the Court is going to impose a monitoring condition on  
11 the personal computers that Christopher possesses that the --  
12 that there be a reasonable suspicion requirement, that those --  
13 the data that's collected should be reviewed only if reasonable  
14 suspicion exists that there's been a violation of a condition  
15 of supervision and the data contains evidence of that  
16 violation.

17 THE COURT: All right. Mr. Buckley, I'm not as  
18 familiar with the way this software works as I perhaps should  
19 be. Does the software keep data on usage that then has to be  
20 accessed by someone in order to be viewed?

21 THE PROBATION OFFICER: Yeah. I mean, I'm  
22 probably -- my knowledge of this company and how it works is  
23 somewhat limited, but I have had several conversations, then  
24 today in preparation of our hearing, and I'll relate to you  
25 what I know. But before I get there, I just wanted to at least

1 kind of respond to the defendant's, I guess, objection to  
2 number 11.

3 Number 11 really is a -- essentially a search of the  
4 computer to ensure that the software -- monitoring software has  
5 been properly installed and that there's been no attempt to --  
6 to thwart it or anything like that.

7 So it's not a full-blown search; we're just trying  
8 to ensure that it's on there. And there is other language in  
9 the OPT report that talks about that a search would not be  
10 conducted of his belongings and stuff like that for -- in  
11 search of a violation unless there's reasonable suspicion. And  
12 the language that is proposed by the defendant in allowing the  
13 access to this information only upon the condition -- only upon  
14 the finding of a violation kind of prevents the whole  
15 supervision purpose of the monitoring software.

16 But what I would like to --

17 THE COURT: Mr. Buckley, wait, wait.

18 THE PROBATION OFFICER: Sure.

19 THE COURT: I need to -- I may not be envisioning  
20 this properly, but there is software developed by some private  
21 company that the government contracts with that gets installed  
22 on his computer. That software requires that certain records  
23 be made of the defendant's use of his computers. That  
24 information is then stored somewhere and it is not inspected  
25 unless someone makes an effort to look at it.

1                   Is that right or wrong? Is my understanding --

2                   THE PROBATION OFFICER: Well, my understanding is  
3 that the new company that we've contracted with, there is some  
4 analysis by that company in looking at the information, either  
5 the keystrokes or any type of material. The best I can  
6 describe it is kind of in the context of a sex offender,  
7 because that's where all of these cases have -- what do you  
8 call it -- have, I guess, been part of this -- the software  
9 monitoring.

10                  So in some instances, with those cases, we have been  
11 alerted by the contracting company that the defendant whose  
12 computer is being monitored is looking up or accessing child  
13 porn. So we might get an alert that that person is viewing  
14 explicit material and then we would take corrective action.

15                  So there is some analysis by the third-party company  
16 and also the probation officer has access to the software and  
17 is able to look in, I guess, the portal to see what type of  
18 things are being either keyed in or looked at or anything like  
19 that. So there is some sort of, I guess, analysis, for lack of  
20 a better word.

21                  THE COURT: Well, all right. So it sounds like we  
22 don't really know. I mean, I'd probably have to have an  
23 evidentiary hearing on this point. What it sounds to me like  
24 is the company probably has set up the software so that there  
25 are certain -- if certain events occur, a notice is provided to

1 the company who then looks at -- like, say, if keywords are  
2 used or certain sites are accessed --

3 THE PROBATION OFFICER: Correct.

4 THE COURT: -- that the company would get notice of  
5 it and then the company looks at it and if the company thinks  
6 it's something the probation office needs to know about, they  
7 tell the probation office and then the probation office can  
8 look

9 more -- in more detail at it if it wants to. And it also --

10 THE PROBATION OFFICER: Correct.

11 THE COURT: It sounds like you have the capacity to  
12 look at the actual information yourself if you want to, even if  
13 you don't get notice. That seemed to be the second part of  
14 what you were saying.

15 THE PROBATION OFFICER: That's my understanding.

16 And my knowledge of this is very, very limited.

17 THE COURT: All right.

18 MR. LEVIN: Judge, I think that's our real objection  
19 to this is that it's hard to imagine how -- what they're going  
20 to be looking for --

21 THE COURT: Yeah, let me just stop you. Okay?  
22 Because if I'm going your way, you probably want me to just  
23 stop and let me go your way, won't you?

24 MR. LEVIN: Okay. All right.

25 THE COURT: All right. So I'll give you a chance to

1 say what you want to say, but let me first come back to the  
2 government.

3 I'm not sure that this is equivalent to a sex  
4 offender case where we need to have this very intrusive  
5 monitoring software on the defendant's electronic devices.  
6 I -- a condition that says on reasonable suspicion, you know, I  
7 can say they -- that the defendant shall disclose all  
8 electronic devices that he uses to communicate with the  
9 Internet and always update the probation office with respect to  
10 any changes in the electronic devices he accesses and that upon  
11 reasonable suspicion that the defendant has engaged in offenses  
12 or violations and has used electronic means to further those  
13 violations, the probation officer shall be able to inspect the  
14 defendant's computers for evidence of that kind of violation.  
15 That would seem to be a much less intrusive way of addressing  
16 this issue.

17 I think with respect to sex offenders, there's a  
18 much stronger argument for this kind of persuasive monitoring  
19 that you're talking about. It's not as clear to me that it's  
20 necessary in this particular case.

21 What's your reaction to that?

22 MS. KRASINSKI: So I agree that it's not equivalent  
23 to a sex offender case and I -- I agree that the monitoring  
24 software sort of is imperfect in a case like this. But where  
25 the defendant has a history of violating probation terms by

1 mentioning victims in an online forum, as in the Virginia case,  
2 I think the monitoring condition is appropriate here.

3 I don't necessarily have a problem with a reasonable  
4 suspicion requirement to have probation review data that's  
5 captured by the monitoring software. I think that would be  
6 reasonable. The only sort of caveat I have is that I do think  
7 there needs to be a way for probation to confirm that  
8 monitoring software hasn't been interfered with.

9 In my experience with this monitoring software --  
10 again, in a sex offender or in a sexual exploitation case --  
11 the software essentially -- I don't know the time, the amount  
12 of time between each screenshot, but has a set time and, you  
13 know, would just kind of take screenshots along the way. And  
14 then in that case, we learned that the -- that defendant was  
15 using it to contact the minor victim and were able to go back  
16 and look. But -- it's not perfect even in that -- even in that  
17 context because there wasn't a real way to search or anything  
18 like that.

19 So I would agree to a reasonable suspicion term, but  
20 I think particularly with his bail violation from Virginia that  
21 a condition is appropriate here, particularly for deterrence.

22 And I also want to be very sensitive to any  
23 employers and to their data as well. I think that's important.  
24 I think him being successful on supervised release will -- I  
25 mean, I think he'll need to have some type of employment to

1 help him be successful on supervised release. I think that's  
2 important and I want to help facilitate that for him.

3 So the only thing that I don't really understand how  
4 to do with the monitoring software is just allow probation to  
5 confirm that it hasn't been tampered with and that it is  
6 functioning, but then to have some requirement -- reasonable  
7 suspicion requirement to actually review it, I would be  
8 completely fine with that.

9 THE COURT: Refresh my memory as to what the  
10 violation of probation was that you're referring to in the --  
11 from the Charlottesville conviction. Was there a specific  
12 probation term that barred him from publishing certain names or  
13 contacting victims or something? What was the violation there?

14 MS. KRASINSKI: The --

15 THE COURT: I don't --

16 MR. LEVIN: I'm sorry. Go ahead.

17 MS. KRASINSKI: No, go ahead, Jeff.

18 MR. LEVIN: I thought that there was a -- in a civil  
19 case there was a court order that he not reference the names of  
20 the people that were suing him. That was my recollection. But  
21 I could be wrong about that.

22 MS. KRASINSKI: I am going to pull up -- it's just  
23 going to take me one second. There was a condition of his  
24 pretrial release that he not reference the victims at all,  
25 either on his podcast or online, and then before -- and then --

1                   MR. LEVIN: That's right. And he was charged with a  
2 violation for that and then I believe that that was dismissed,  
3 that the judge found that he didn't violate that. And we  
4 have -- I have that order somewhere.

5                   MS. KRASINKSI: I have never seen an order finding  
6 that he didn't violate that. I have seen the writs issued for  
7 that and then his plea that he violated the conditions of  
8 release.

9                   MR. LEVIN: I'm not -- I guess my question is I'm  
10 not sure that we need monitoring software to uncover that.  
11 That was something that was published in public and that's why  
12 he was charged with it, but ...

13                  THE COURT: Yeah, I -- this is not -- this  
14 defendant's use of the Internet is -- unlike people like, say,  
15 the victim in this case, I'm not aware that the defendant has a  
16 practice of communicating on the Internet and disguising his  
17 identity. I mean, his -- what I could very much foresee is  
18 once he gets out that he starts up his Internet programs again  
19 and starts trying to publicly attack the victim or other people  
20 that would be problematic during a period of supervised  
21 release, but I -- this isn't a case like in a child sex offense  
22 case where the defendant has a history of using the Internet in  
23 deceptive ways. It is the kind of case where he -- I mean, he  
24 thrives on doing things -- outrageous things in public. That's  
25 how he makes a living, it seems to me. I may have it wrong,

1 but that's my take on the defendant. He does things that are  
2 extreme and outrageous because it's a way of making money. I  
3 don't know.

4 Did I -- Ms. Krasinski, do you have a different take  
5 on how he would potentially misuse the Internet during a period  
6 of supervised release?

7 MS. KRASINSKI: No, I -- I agree with the Court,  
8 that if he were to misuse the Internet, that's how he would do  
9 it, but I think that having monitoring software installed on  
10 his electronic devices would deter him from using the Internet  
11 to do things like that.

12 I've just pulled up and I can email it -- I  
13 apologize. We just got new computers. I thought they'd be --  
14 they would work a little bit better.

15 But -- and I can circulate this, the Commonwealth  
16 motion to revoke or modify bond where -- if I can't get my  
17 computer to work, I'll just have to move on, but where the  
18 Commonwealth had instructed the defendant to refrain from  
19 direct or indirect contact with the victim and that despite  
20 that, the defendant continued to repost on social media  
21 inflammatory or offensive messages from others regarding the  
22 victims after counsel directed the defendant to remove the  
23 post. And notwithstanding that, the defendant continued to  
24 engage in online communication intended to harass and  
25 potentially intimidate victims in that matter.

1                   So, you know, I understand that once he's on  
2 supervised release, you know, he -- he can't be -- he can't  
3 then interfere with preparation for trial by harassing or  
4 intimidating witnesses, but he could potentially use the  
5 Internet to harass or intimidate the victim in this case. And  
6 so I think the monitoring software's important -- is an  
7 important -- has some deterrence value there.

8                   And I can certainly circulate this. It's in the  
9 docket somewhere. It was an attachment to our motion for  
10 pretrial detention, but I can circulate this again if the Court  
11 would like.

12                  THE COURT: Yeah.

13                  THE PROBATION OFFICER: Can I --

14                  THE COURT: Thank you for describing it for me. I  
15 think, though, it confirms my -- my take on the defendant.

16                  I -- I think there is a real potential that the  
17 defendant, when he completes his sentence, will go -- will  
18 continue to use the Internet in ways to shock and provoke.  
19 Some of that may be legitimate and not the subject of  
20 regulation. But to the extent he were to engage in  
21 extortionate and threatening behavior again using the Internet,  
22 that obviously would be potential criminal conduct that would  
23 be the subject of legitimate regulation during a period of  
24 supervised release.

25                  So, Mr. Levin, just let me just come to you and say,

1 number one, I am persuaded that we should carefully limit any  
2 condition so as not to subject any potential employer to any  
3 kind of monitoring software. I think we should make clear that  
4 to the extent the defendant has access to any software or  
5 hardware of a third party for business purposes that he shall  
6 not use that -- that software or hardware for any other purpose  
7 other than to fulfill his obligations to his employer.

8 I think that you're right; we don't want monitoring  
9 software on any employer's computers or we don't want our  
10 probation officer monitoring what's going on with any  
11 employer's legitimate business activity. I think we can  
12 legitimately prevent your client from using his access to those  
13 electronic devices for any purpose other than for the business  
14 purposes for which he was hired so that it's at least a  
15 condition that he not do -- use those computers for any kind of  
16 personal purposes. I think it's legitimate to require him to  
17 disclose and keep current a list of all electronic devices that  
18 he does access use for personal or his own personal business  
19 purposes.

20 I think it's legitimate -- entirely legitimate to  
21 have a condition that says he shall subject all of his personal  
22 electronic devices for inspection by the probation officer on  
23 reasonable suspicion that the defendant has engaged in conduct  
24 which violates -- could violate any condition of his release.

25 So that much I'm, you know, quite comfortable about.

1 Where I start to have problems is whether this is an  
2 appropriate case for the use of monitoring software, which is  
3 substantially more intrusive. The use of that software is --  
4 seems clearly appropriate for certain kinds of sex offenses  
5 where while under a period of supervision we have reason to be  
6 concerned that a defendant may have surreptitious contact with  
7 minor victims or may attempt by concealing his identity and  
8 through other means to access child pornography while on  
9 supervised release. I'm just not sure this is the kind of case  
10 where I need to have that monitoring software installed.

11 So --

12 THE PROBATION OFFICER: Your Honor, can I interject  
13 for one second?

14 THE COURT: Yes, go ahead.

15 THE PROBATION OFFICER: Yeah. And I had this  
16 discussion with my supervision officers yesterday in  
17 preparation of the hearing. And they did tell me that, you  
18 know, ideally this software is set up for sex offenders, just  
19 because of the explicit nature of the material in which that  
20 they're viewing. So the -- the nature of it itself is illegal,  
21 so it's easy to put in keystrokes and phrases and things like  
22 that because for most of the time, that's going to result in  
23 the -- you know, them looking at that material. There could be  
24 some false positives, they might have looked at an article that  
25 had those terms in there, but for the most part, that stuff is

1 easily identifiable and it's a violation of their terms of  
2 supervised release.

3                   But in a situation like this where it's a threat,  
4 it's -- the terms that we would use by themselves can be very  
5 benign and it's hard to say that that is a violation because,  
6 you know, they're just words. You have -- the threat is  
7 because you're looking at it in the context of how he's using  
8 that, so there is very likely that we would get a lot of false  
9 positives. So if he's viewing material that might have a --  
10 you know, rape or have a threat or something like that, that  
11 they could be very benign and we might get inundated with all  
12 of these alerts that really, going through all of it, may not  
13 amount to anything just because of the nature of the offense  
14 itself.

15                   THE COURT: Right, views that are reprehensible and  
16 associated with --

17                   THE PROBATION OFFICER: Absolutely.

18                   THE COURT: -- with behavior, but he has a First  
19 Amendment right to think about whatever he wants --

20                   THE PROBATION OFFICER: Absolutely.

21                   THE COURT: -- to think about and he has First  
22 Amendment rights to engage in communications that I find  
23 abhorrent and repulsive and -- but are not an appropriate  
24 subject of violating a -- him on a supervised release  
25 condition. So I -- I think we have to be careful to draw those

1 distinctions.

2 So, Mr. Levin, if -- is it all or nothing for you?  
3 Is it your position that, Judge, there is no condition like the  
4 one you're talking about that you could legitimately impose  
5 that we would ever accept? And if it is, then I'll just try to  
6 work this out on my own and I'll just issue a modified  
7 condition.

8 But if you think that you could live with a  
9 condition like the one I'm proposing which says, A, the  
10 defendant shall not use -- to the extent -- the defendant shall  
11 list any -- keep a current listing and provide to probation of  
12 all electronic devices that -- to which he has -- he has access  
13 for personal or personal business purposes; that he shall not  
14 use any electronic devices or electronic access that he has  
15 for -- while employed for any employer for any other purpose  
16 other than for the business purposes for which he's been  
17 retained by that employer; and, C, upon reasonable suspicion  
18 that the defendant has violated a condition of his release, he  
19 shall subject all of his electronic devices for personal --  
20 that he uses for personal purposes to inspection by the  
21 probation officer and not have the monitoring software  
22 installed at all.

23 Is that a kind of condition you could ever see you  
24 and your client agreeing to? If so --

25 MR. LEVIN: Yes, absolutely, and I would just add to

1 that that reasonable -- reasonable suspicion that he's violated  
2 a condition of his release and that the -- the device contains  
3 evidence of that. I mean, that would be the --

4 THE COURT: Right.

5 MR. LEVIN: Those are the -- the two requirements --  
6 the two prongs, I think, that give rise to a search.

7 THE COURT: All right. If you would -- if you could  
8 conceive of that as being acceptable, would you be willing to  
9 take a shot at drafting the proposed condition language that  
10 would be acceptable to your client, share it with the  
11 government and the probation officer, the government and the  
12 probation officer will have seven days after you submit it to  
13 propose any objections, and then I'll write the condition the  
14 way I think it should be written.

15 But I'm inclined to do it that way because this  
16 seems to be a somewhat different case from a sex offender case.  
17 There may be an occasion where I have to hold a hearing and  
18 fully examine the details of this particular monitoring  
19 software. I think there are occasions where the use of  
20 monitoring software is appropriate because we don't -- can't,  
21 except in extreme cases, completely cut off a defendant's  
22 access to the Internet, yet defendants on supervised release  
23 may well pose special risks to the public if they use  
24 electronic devices.

25 So the use of monitoring software in those

1       circumstances may be appropriate, but where a monitoring  
2       condition is challenged by a defendant, I think I would  
3       probably need to hold an evidentiary hearing, get the  
4       consultant in, understand fully how the monitoring software  
5       works, and then try to take my shot at drafting a condition  
6       that properly balances the public interest in ensuring that the  
7       defendant is not using electronic means to violate supervised  
8       release against the defendant's First Amendment and privacy  
9       interests. And -- but that would be a long, involved process  
10      so that we could then set up a case where the First Circuit  
11      could issue a decision which would then guide all subsequent  
12      courts in our circuit as to how to use these conditions.

13           I don't think we need to do that in this case  
14      because my take on this defendant is not that he won't violate.  
15      I think there's a high risk that he does violate supervised  
16      release. But he has -- in my view, the defendant has very poor  
17      impulse control, but he lashes out and he lashes out publicly.  
18      And if he lashes out publicly using the Internet, then it's  
19      highly likely there'll be reasonable suspicion to believe that  
20      he committed an offense and, frankly, the defendant might well  
21      be not inclined to even deny it. He's -- he -- he sort of is  
22      what he is, does what he does, and things happen to him as a  
23      result. That's sort of my take on this defendant. It's not  
24      like he's going to be using pseudonyms to plan secret attacks  
25      on the Capitol or something. That isn't the picture of the

1 defendant that I -- that I see.

2 MR. LEVIN: Short of another -- short of another  
3 threat, as like the one in this case, I can't really imagine  
4 what he would say, either publicly or privately, that would --  
5 that would violate the conditions of his release.

6 But so just so I'm clear, in terms of the -- the  
7 ingredients, the ingredients are that he maintain a list of the  
8 devices that he's using and provide that to the probation  
9 officer; that he keep his personal devices separated from his  
10 business devices and -- and not use business devices for  
11 personal reasons; and then, third, that he submit to a search  
12 of his devices if there's reasonable suspicion --

13 THE COURT: Yeah.

14 MR. LEVIN: -- that a violation --

15 THE COURT: The only addition I'd make to that,  
16 Mr. Levin, as we're talking about it, is that you distinguish  
17 third-party business uses --

18 MR. LEVIN: Right.

19 THE COURT: -- from his personal -- because he  
20 has -- he will use the Internet for business reasons of his own  
21 and --

22 MR. LEVIN: Right.

23 THE COURT: -- those have to be devices that he  
24 lists and discloses. I just don't want to -- like if he goes  
25 to work for Microsoft, I don't want him to be agreeing to a

1 reasonable suspicion search criteria to search Microsoft's  
2 computers because he works for Microsoft.

3 MR. LEVIN: Right.

4 THE COURT: What I want to do is just say to him,  
5 you can't use Microsoft computers for any purpose other than  
6 what you've been engaged in by Microsoft.

7 MR. LEVIN: Right.

8 THE COURT: And if we end up tracking him using them  
9 for some improper purpose, that would be a violation of the  
10 condition. And that way we don't have to worry about maybe  
11 we'd be -- he'd be agreeing to searches of Microsoft computers  
12 on reasonable suspicion.

13 So if you can draw that distinction between his  
14 personal uses and personal business uses from business uses  
15 while engaged to perform work for third-party employers --

16 MR. LEVIN: Right.

17 THE COURT: -- and those third-party employers, that  
18 he simply agree that he will not use any of those devices for  
19 any purpose other than the purpose for which he's been engaged  
20 by that employer; and then that he make the disclosure of the  
21 others and that on reasonable suspicion any of those devices  
22 that -- that he has used for his personal or personal business  
23 purposes that can be tied through reasonable suspicion to a  
24 violation can be subject to searches. That would be the kind  
25 of condition I'd -- I'd be -- I'm inclined to impose. And I --

1 I think it may make sense to give you the first shot at trying  
2 to draft that and submit it to the government and to the  
3 probation office.

4 And feel free to consult with Mr. Buckley. He might  
5 have some language for you and -- but if you propose it and  
6 then I can get the other two people to react to it and then  
7 I'll come up with the final draft and put it in the condition.

8 MR. LEVIN: Okay.

9 THE PROBATION OFFICER: Can I make a --

10 MS. KRASINSKI: Your Honor --

11 THE PROBATION OFFICER: -- suggestion?

12 THE COURT: Yes, Mr. Buckley, go ahead, and then  
13 Ms. Krasinski.

14 THE PROBATION OFFICER: Yeah. So as a practical  
15 matter, you know, what I understand from the parties and from  
16 the Court is that just looking at the OPT form or report, we  
17 would get rid of the condition -- yeah, condition number 10 and  
18 11 that deal specifically with the computer monitoring, but  
19 number 8 and 9 talk about the overall search condition and then  
20 9 is really more of a you must submit your computer.

21 So some of that language that the Court is talking  
22 about is already included in number 9. My suggestion to Jeff  
23 would be to kind of incorporate the judge's suggestions and add  
24 at that to 9 because it includes all of that information anyway  
25 about reasonable suspicion on those devices.

1 MR. LEVIN: Okay.

2 THE COURT: Yeah. Mr. Buckley, you can take out 10  
3 and 11 and just add the 9 to make sure we've covered everything  
4 that I've talked about.

5 THE PROBATION OFFICER: Yup. And I'm happy to work  
6 with Jeff.

7 THE COURT: Okay. Why don't you do that,  
8 Mr. Buckley.

9 Mr. Levin, feel free to contact Mr. Buckley as you  
10 work this out. And, again, it might be worth like sending an  
11 email to the government and to Mr. Buckley, how does this work,  
12 and if you all three agree and you then file something and  
13 represent that we all agree on this condition, I'll just adopt  
14 it.

15 MR. LEVIN: Sounds good.

16 THE COURT: Okay. Ms. Krasinski --

17 MS. KRASINSKI: Your Honor --

18 THE COURT: -- did you want to say anything?

19 MS. KRASINSKI: Yeah. My -- my only comment is, you  
20 know, this defendant has a history of having a lot of  
21 electronic devices and so I just reasonably don't know how  
22 probation would be able to say if there was reasonable  
23 suspicion that the defendant committed a violation and evidence  
24 that -- evidence of that violation would be on one of his  
25 electronic devices, how they would know which specific device,

1 you know, be it his phone or one of his laptops or his desktop.

2 So I would just ask that whatever condition sort of  
3 not be so narrow as to require probation reasonable suspicion  
4 with regards to one specific device.

5 THE COURT: Yeah, I --

6 MS. KRASINKSI: Because I practically don't know how  
7 they would do that.

8 THE COURT: No, I of course agree with you on that.

9 And my own view, frankly, is that if -- if it's a device that  
10 is connectable to the Internet and there's reasonable suspicion  
11 to believe that the defendant has used an electronic device to  
12 communicate in a way that violates the condition of release,  
13 that would justify the reasonable suspicion to search any of  
14 the devices that are Internet-capable that he has.

15 So I -- you know, Mr. Levin can disagree and you can  
16 play around with the language of it, but the reasonable  
17 suspicion standard, in my view, is a very -- is a much lower  
18 threshold standard than the probable cause standard and the  
19 particularity requirement with electronic devices under these  
20 circumstances would work in a different way. But Mr. Levin can  
21 preserve his right to argue differently and so on and so forth.

22 But I agree with you that it's an unusual case where  
23 we have the kind of metadata to be able to tie it to a specific  
24 device within the home. We might get a -- an indication that  
25 it came from a particular location, but there probably could be

1 15 devices that would access that and you wouldn't be able to  
2 further identify it necessarily. But that would give  
3 reasonable suspicion to justify an inspection of anything.  
4 Look, at some point we just -- we have to be realistic about  
5 it.

6 So, Mr. Levin, take your best shot, work it out with  
7 the others, and I'll just do what I need to do here. I just  
8 did not want to try to -- Mr. Cantwell's got his appellate  
9 arguments here on the sentence, the trial, whatever he wants to  
10 argue. We don't need to take up the First Circuit's time in  
11 this case on a litigation of First Amendment rights and Fourth  
12 Amendment rights and a monitoring software condition. If we  
13 want to set up an appeal on that issue, we need to develop the  
14 record better than we've developed it and in this particular  
15 case I just don't think it works -- it is as clearly necessary  
16 as it may be in certain kinds of cases like certain types of  
17 sex offender cases.

18 So, all right, Mr. Levin, I appreciate your -- your  
19 flexibility here. Why don't you take the first shot, work with  
20 the others. If you can't get agreement, just tell me what you  
21 propose; the others can file their objection. You know, let's  
22 not let too much time go by here.

23 So if, Mr. Levin, you could try to put something  
24 together within a week and circulate it and if the probation  
25 office or the government have objections, they can file

1       objections within three days afterwards. I'll look at it, make  
2       any revisions to the proposal that I need to make, and  
3       incorporate in the judgment, sign the judgment so Mr. Cantwell  
4       can get on with his life wherever he's going to be assigned.

5           Is there anything else that anybody wants to take up  
6       with me about this particular issue?

7           THE PROBATION OFFICER: No, your Honor.

8           MR. LEVIN: No, your Honor.

9           THE COURT: No.

10          MS. KRASINSKI: No, your Honor.

11          THE COURT: Okay. Good. Thank you, everybody. I  
12       appreciate it. It's an interesting discussion and at some  
13       point we may need to do more on this, but I don't think this is  
14       the case to do it in. So I think there's a good practical way  
15       to resolve the problem.

16           All right. That concludes the hearing. Thank you  
17       for your help.

18           THE PROBATION OFFICER: Thank you.

19           THE COURT: Thank you. Bye-bye.

20          (Proceedings concluded at 3:58 p.m.)

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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 5/12/21

/s/ Liza W. Dubois  
LIZA W. DUBOIS, RMR, CRR